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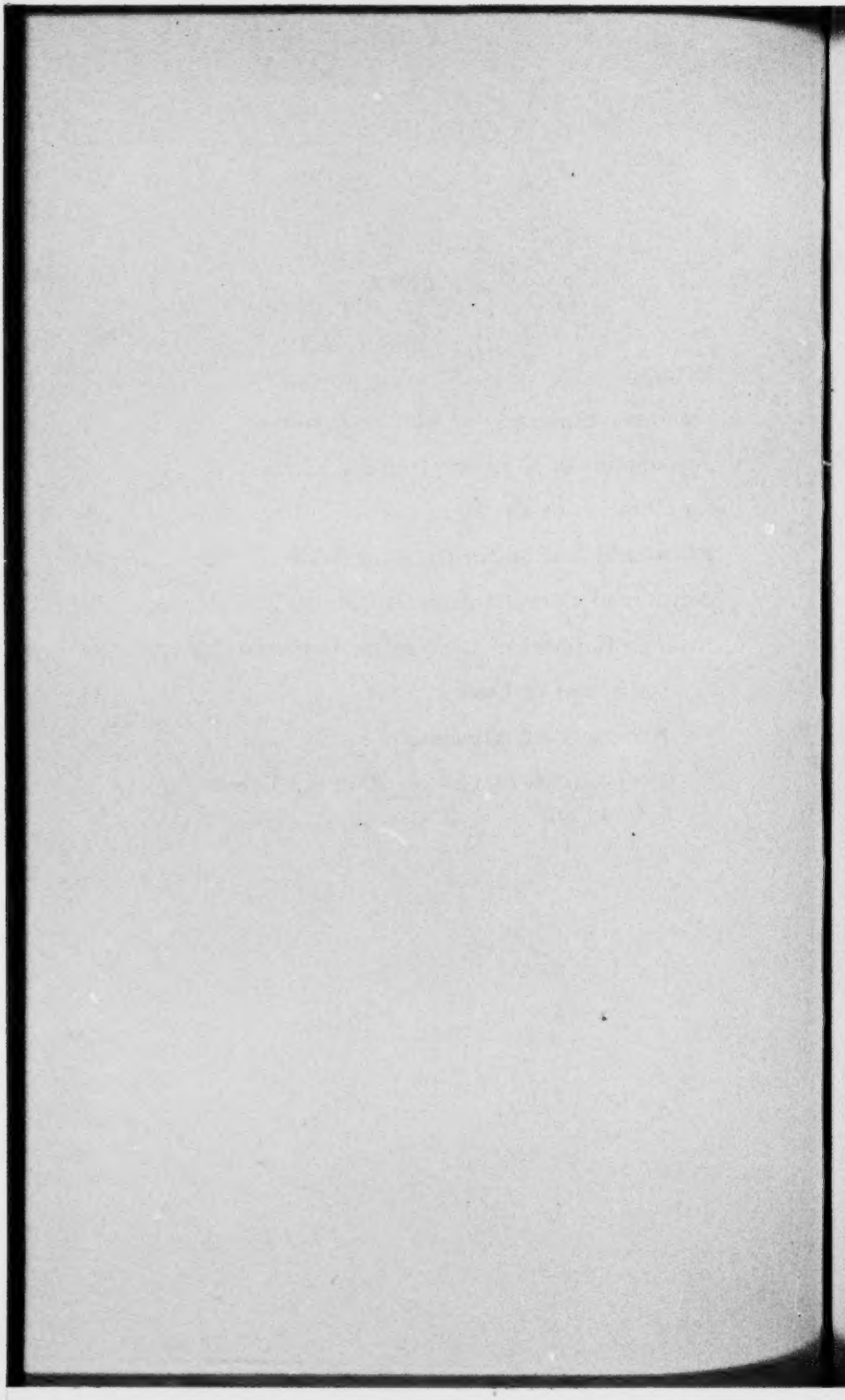

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No._____

C. T. EARLE, Petitioner

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, AND YAZOO & MISSISSIPPI VALLEY RAILROAD CO., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

PETITION

Petitioner, C. T. Earle, prays this Court to review on writ of certiorari a judgment of the Court of Appeals of the Western District of Tennessee, and the Supreme Court of Tennessee, in a case there entitled C. T. Earle vs. Illinois Central Railroad Co. et. al.

A final judgment of the Supreme Court of Tennessee was rendered July 25, 1942, when a petition for rehearing was denied (R 22 7). This court had previously, on June 27, 1942, denied a petition for writ of certiorari from the Court of Appeals of Tennessee, at

Jackson, in the Western District of Tennessee. No opinion was rendered by the Supreme Court other than the simple denial of the writ, and the judgment of the Supreme Court affirmed the judgment rendered by the Court of Appeals, and, in effect, endorsed the opinion of that court. The Court of Appeals rendered its opinion and judgment on February 20, 1942, (R 225). The petition for writ of certiorari was filed in due time on March 16, 1942, and was denied with results as stated.

The action of these courts was to reverse a judgment (decree) of the Shelby County Chancery Court, rendered April 21, 1941, which appears in the record (R 29-33), following the opinion of that court (R 34-40). This decree had granted to petitioner, as complainant, a recovery of $11,728.35 as damages for breach of a railroad labor contract of employment, for unjust discharge of petitioner, a yardman.

The defendant railroads appealed to the Court of Appeals, from this judgment, and assigned numerous errors. The Court of Appeals reversed, and petition for certiorari was filed, based on seven assignments of error, one of which, Assignment 7., (R 229) embodies the federal question.

The procedure under Tennessee statutes is that where a certiorari is denied by the Supreme Court, the record is returned and lodged with the Court of Appeals. However, the clerk of the Supreme Court at Jackson, Tenn., serves as clerk of the Court of Appeals, Mr. J. E. Springbett. (22 Tenn. App. Rep. 5.: 175 Tenn. 6.) His title is simply, Clerk of the Supreme

Court, Jackson, Tenn. To avoid technical objection, petitioner prays for certiorari to both courts.

Tennessee Supreme Court Rule II allows 45 days for filing petition for certiorari from Court of Appeals. 173 Tenn. 872. Under Rule 32, petition for rehearing may be filed within 10 days from date opinion is announced. 173 Tenn. 886. Opinion was announced June 27, 1942. Petition for rehearing filed July 6, 1942.

SUMMARY STATEMENT OF THE MATTER INVOLVED

C. T. Earle was employed by the Illinois Central Railroad Company, and its subsidiary, the Yazoo & Mississippi Valley Railroad Company, Sept. 26, 1923, as a switchman, or yardman, and continued in their service until July 26, 1933, when he was discharged.

The Brotherhood of Railroad Trainmen had a written contract with the railroads, governing the terms of employment of yardmen, as well as other types of employees. This contract was printed and booklets containing same were distributed among the employees. Earle had such a booklet, which he filed as exhibit 2 to his bill in Chancery. The booklet contains other contracts, that of trainmen, that of Chicago Suburban trainmen, the yardmen contract being found on pages 32-41. (Exhibit 2 to the Bill, exhibited with this record.) R 95-109

The discharge was effected by means of a letter written to Earle by the railroads, dated July 26, 1933, as follows:

"This is to advise that effective this date your name has been removed from the seniority list, due to the fact that you have not performed service off the regular extra board for a period of six months.

Call at superintendent's office and turn in any company property that you may have in your possession.

E. Bodamer,
J. R. Burns, Trainmasters."

See letter copied in bill, (R 3-4), and opinion of Court of Appeals, (R 16)

Petitioner, suing on this contract, claimed that thereunder discharge could only be made for just cause found upon a trial; that no just cause existed, and no trial was given; that the letter constituted a breach of contract; that, thus, he had been deprived of his right to work and earn pay according to his seniority, and had been damaged.

Petitioner then goes on to say that the factual matter in the letter is untrue because he did perform service, his usual type of yardman service, on May 29, 30, 31st, and June 30, 1933, well within the six months; and that he was on the regular extra board when he did so, there being no other board.

The Bill (R 4)

The railroads in their answer concede that petitioner performed the service as above stated, but that it did not count because his name was not on the regular extra board at the time.

As to the contract exhibited and sued on, the railroads say of it, that it was not the entire contract, but

only a part of it; that there were other parts of the contract. Having thus said, the railroads freely make contract averments in their answer, thus:

> "It was further provided by said agreement between defendants and the labor organization that if any employee was not called to work from this extra board for a period of six months, such employee by the lapse of time was no longer an employee of defendants and lost his seniority rights and all other rights.
>
> It was further provided by said agreement between defendants and the said labor organization that if an employee's name did not appear on said extra board, nevertheless, defendants had the right to call said employee for work after all the names on said extra board had been exhausted, and it was further agreed that in the event an employee whose name did not appear on said extra board was called for work and did perform work, such work constituted emergency work and that emergency work did not affect the six months period as aforesaid."
>
> The Answer (R 12-13)

Petitioner promptly filed a motion to strike these averments from the answer on the ground that they were not to be found in the contract sued on, and were in conflict therewith.

The Motion to Strike (R 19-26)

The Chancellor reserved the matter of the motion for the hearing, and did not expressly pass on same then, but decided the case on the full merits in favor of petitioner. The virtue of this motion was urged on the appellate courts.

The Chancellor finds and holds that there was no

trial given petitioner, and no just cause for his discharge; that the letter constituted a wrongful discharge, entitling him to damages for time lost. The Chancellor also finds that petitioner performed service on May 29, 30, 31st, and June 30, 1933, well within the six months; that it was not material whether his name was on the extra board, or not, there being no provision in the contract requiring that feature.

Chancellor's Opinion (R34-40) Decree (R39-33)

The Court of Appeals finds and holds that petitioner performed his usual duties as a yardman on May 29, 30, 31, and June 30, 1933, but holds that he was not 'in service' on those dates; that he had been let out, Jan 20, 1933, along with 55 or 60 others, in a reduction of force, after which he sustained no relationship to the railroads other than that contemplated by a certain 'Request & Answer 79'. This is one among numerous requests and answers, of the year 1914, which are printed in the back of the booklet filed as exhibit 2 to the bill, and exhibited with this record. See page 56. R154

> "Request 79. That when trainmen are laid off account of reduction in force, they shall retain their seniority and be returned to the service when business justifies, in accordance with their seniority standing, provided they be returned to the service within one year.
>
> Answer. I said to the Committee that a letter would be issued stating that it was the policy of the Management in employing men to take back into the service those who were laid off account of falling off in business, unless there was some particular objection, and that in future, men that were laid off account of falling off in business if they kept in touch with the Division Officers so as to be available, would be re-employed in preference

to men not heretofore in the service. If they are not out of the service to exceed six (6) months, they will be considered as having been in continuous service."

The Court of Appeals holds that petitioner was 'out of service' when he was let out on a reduction of force, and on the four days he worked he was not 'in the service', and the fact that he was not regarded as 'in the service' was evidenced by the fact that his name was not put on the extra board; and that when the letter was written, July 26, 1933, the relationship had fully terminated by the expiration of the six months period, and the railroads were under no obligation to re-employ him; and the letter was in effect no more than a notice that they did not intend to re-employ him; and was not a breach of contract.

Opinion Court of Appeals (R 222)

As to the trial provisions of the contract the Court of Appeals holds in line with the great weight of authority, including, Moore vs I. C. R. R., 312 U. S. 630, and 112 Fed (2nd) 959, that:

"They take the view that the stipulation that the cause of discharge shall be found unjust implies that the severance of the relationship is not to be at the employer's will but only for just cause, and further that it would be unreasonable to hold that the railroad officials are the final judges of the justness of the cause.

This seems to be the view adopted by our Supreme Court, (Tenn.) and we do not understand that the contrary is contended for by defendants in this case."

Opinion Court of Appeals (R 174)

Applying this law to the instant case the Court of Appeals holds that if the railroads did not give petitioner the trial to which he was entitled, petitioner has now had a trial in court; the court in effect holding as justified the ground of dismissal, that is that petitioner had been out of service to exceed six months; reaching this conclusion by the court's holding that at the time he worked on the three days in May, and one in June, 1933, he was not then 'in the service'.

Opinion of Court of Appeals (R176-177)

Both the Chancellor and the Court of Appeals held that the contract was wholly in writing.

Opinion of Court of Appeals (R209)

Request & Answer 79, dated, March 11, 1914. Labor contract, pages 32-41, Exhibit 2 to bill, dated, effective. April 1, 1924.

See exhibit 2 to bill. Pages 32-41, and pages 54-56.

R 95-109 R 134

JURISDICTION OF THIS COURT

Jurisdiction of this Court is based on Sec. 237 of the Judicial Code, as amended by the Act. of Feb. 13, 1925, Ch. 299. Sec. I. 43 Stat. 937, and by Act of Jan. 31, 1928, Ch. 14, Sec. I., 45 Stat. 54. 28 U. S. C. A. 344: (Pittman vs. Home Owners Loan Corp. 308 U. S. 21), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of various states where "a title, right, privilege, or immunity is set forth and claimed under a statute of the United States."

The Supreme Court of Tennessee is the highest court of that state as set forth in Art. VI Sec. I, of Constitution of Tenn., 1870.

In this case a title, right, privilege and immunity were set forth and claimed under U. S. Statutes, to-wit; 44 Stat. 577, and 48 Stat. 1185, the Railway Labor Act. This claim was made, (1st) in a Proposition of Fact, No. 29, filed and presented to the Chancery Court, which became a part of the record in the Court of Appeals, and Supreme Court, and being now made a part of the present record. (2nd) By Assignment of Error No. 7. in the petition for certiorari presented to the Supreme Court. (R 127-132) 228-230

The Chancery Court preserved the right, title, privilege, and immunity claimed, and the Court of Appeals, in reversing the Chancery Court, and the Supreme Court, in denying certiorari, denied the right, title, privilege and immunity claimed.

The right, title, privilege, and immunity claimed are determinative of the issues of the case; and the errors of the appellate courts are fundamental, and their decisions do not rest upon any non-federal grounds adequate to support same.

SPECIFICATIONS OF ERRORS ON THE QUESTIONS PRESENTED

Your petitioner submits that the Court of Appeals and the Supreme Court of Tennessee were in error in the following respects:

I

The courts erred in holding that petitioner was not in the service of the railroads on the days he ren-

dered service as a yardman, May 29, 30, 31, and June 30, 1933. (R 222). This holding was determinative as declared by the courts. It was in conflict with the definition of the terms, "employee' and "in the service", in the Railway Labor Act. Sec. I, fifth, (44 Stat. 577), and with the construction of that Act by the Railway Labor Board, The Interstate Commerce Commission, and the Federal Courts.

II

The courts erred in permitting to remain in the defendants' answer, over a motion to strike, averments of contract terms which were not to be found in the written contract sued on, and which were, in substance, as follows: that unless an employee was called to work from an extra board within six months he was automatically out of a job; and even if he was called to work and did work within six months, if his name was not on the extra board, his work did not count to preserve his job. (R 9-26)

The courts carried the error further in that they changed the averments of contract terms to averments of usage and practice, and then held such usage and practice binding on petitioner by acquiescence, failing to find averments of contract terms supported. The courts, strange to say, declared this usage and practice to be in conflict with the contract. (R 57-189) 193-194

Thus is violated Sec. 6. of the Railway Labor Act, which forbids a change in a contract except upon written notice followed by negotiation and agreement, as well as Sec. 2, first, of that Act, under which the railroads had made, but were not maintaining the con-

tract they had made. A contract, implied, found dehors the pleadings, in usage and acquiescence, in conflict with the written contract, is substituted for that contract.

III

The courts erred in refusing to enforce upon the railroads an estoppel based upon the Railway Labor Act of 1926, as amended in 1934, in that by the 1934 amendment (48 Stat. 1185, Sec. 5 (e)) the railroads were required to file with the Mediation Board a copy of their contracts with various classifications of employees, including yardmen, and, pursuant thereto, they did file with the Board a copy of the yardmen contract, which proves to be identical with the contract sued on in exhibit 2 to the bill, pages 32-41, effective April 1, 1924. See Document produced in response to Demand No. 5, for production of documents.

R 109 A 95-109

This is a statutory estoppel invoked by petitioner, and denied by the courts. It lies under a 1934 amendment, but it produces into the record a contract dated 1924. Petitioner, discharged in 1933, claims, the benefit of this estoppel.

IV

The courts erred in reversing the decree of the chancery court of Shelby County, Tenn., which court had sustained the bill and granted a recovery of damages for breach of contract, the appellate courts reversing the decree and dismissing the bill. This was error in that undisputed facts were that petitioner, a yardman in the employ of the railroads since 1923, was discharged without a trial as provided in the contract, and

without any just cause, and without any reason assigned other than the mere claim that he had not performed service off an extra board within the prior six months, on which matter he had been given no trial or hearing. The reason assigned having narrowed, by undisputed facts, to the mere claim that petitioner was not on the extra board when he actually worked within the six months, the courts were in error in sustaining this as a just cause for discharge, a conclusion which they reached by holdings in conflict with the Railway Labor Act of 1926.

REASONS RELIED ON FOR GRANTING THE WRIT

It is submitted that this court should entertain jurisdiction for the following reasons:

I

The question is substantial and of importance, involving a construction of the Railway Labor Act of 1926 (44 Stat. 577), and affecting materially the rights of railroad labor.

The Tennessee appellate courts held that petitioner, a yardman in the employ of defendants since Sept. 1923, having been laid off on a reduction of force, Jan. 20, 1933, was not "in the service" of defendants on May 29, 30, 31, and June 30, 1933, when, on those dates he was called upon to, and did, render his usual type of service as yardman. (R 22-22)

The Railway Labor Act, Sec. I. Fifth, defines "employee," and "the service", and these terms have been

construed by the Railway Labor Board, The Interstate Commerce Commission, The Mediation Board, and the Federal Courts, to include and mean those employees who have been laid off on a reduction of force, even when no actual service was being rendered.

N. C. & St. L. Ry. Co. vs Employees Dept. A. F. of L. (6th Cir.) 93 Fed. (2nd) 340. Certiorari denied, 303 U. S. 649.

The views of all the above mentioned authorities are fully set forth in the opinion in the case cited. The Tennessee courts conflict with the statutes and the authorities interpreting same.

The decision of the Tennessee courts against petitioner results directly and solely from their holding above set out. Had these courts held that petitioner was "in the service" on the dates mentioned, they would have decided for him. The matter was crucial and determinative, leaving not only no non-federal ground, but no other ground, adequate to support a decision against him, none other being claimed. These courts, themselves, say the question is ultimate and determinative. (R 202)

The defendants had assigned in their letter of dismissal the ground that petitioner "had not performed service off the regular extra board within the past six months," and when it developed that he had actually performed service well within the six months, this left of the ground assigned only the feature of not being on the extra board at the time.

Such, as a ground to be sustained as just, must have struck the Tennessee courts as too superficial, and

they hold that his not being on the extra board was but evidentiary matter, indicating that he was "not regarded as in the service." In this way, by holding that petitioner was not "in the service," the Tennessee courts support the ground assigned in the dismissal letter as a just cause, and defeat his case . (R 198)

II

The Railway Labor Act is violated in other features by the defendants in their pleadings, and by the courts in their holdings.

This Act provides in Sec. 2.

> "Sec. 2. First. It shall be the duty of all carriers, their officers, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions—"

And in Sec. 6.

Sec. 6. provides that changes in the agreement may be made only by negotiation upon thirty days written notice.

1. The defendants violated the Act in their pleadings. Petitioner based his suit upon the agreement which defendants had "made", but when defendants file their answer, they denounce the contract as only a part of a contract, in page 2 of their answer (R 12), they say it was merely "the most important and most used provisions of the contract". Then they feel free to aver, and do aver, other contract terms, as set out, supra, in the summary statement of this petition.

Answer (R 12-13)

We submit that this constitutes a failure to "maintain" the agreement, and a change of the agreement in a manner forbidden by the Act.

2. A study of the averments in defendants' answer and the opinion of the courts reveals this fact:

Nowhere in the opinion do the courts sustain the averments of contract terms found in defendants' answer. Indeed, they do the opposite. They mention an agreement between officials of the Brotherhood and officials of the railroads for the addition of seven words to the Answer to Request 79, to-wit: "emergency work not to be considered service", but they hold that this was not binding on petitioner, because they were not published until 1936, three years after his discharge, nor were they otherwise brought to his attention. No where else do they hold that there was an "agreement", but, in lieu, they hold that there was a "uniform practice", or "implied understanding", or "usage"; and, even of these usages and practices, they say that they were in "direct contravention of the requirements of the agreement" (R 223) 193

This action of the courts, first, in not striking from the answer the contract averments, on the motion to strike duly filed by petitioner, and, second in substituting for the averments of contract terms, unsustained, the courts' findings of "uniform practice", "implied understanding", "usage", etc.—such action of the courts is but a deepened disregard of the provisions of the Railway Labor Act above noted.

The findings of "uniform practice," etc., constitute a distinct variance from the averments in the pleadings,

and are, coram non judice, and not binding as fact findings.

Pencil Co. vs R. R. 124 Tenn. 57.

3. The Tennessee courts in their logic advance toward their goal of establishing that petitioner was not "in the service" on the days he actually worked, for several pages (R204-209) toy with the idea of putting him on the basis of separate and distinct contracts, for the days he worked, to arise by implication, and acquiescence, with terms fixed by usage. Such would have been another distinct variance from the averments in the pleadings. The courts, however, finally hold (R 209) that the contract was wholly in writing.

4. The logic steps of the courts are these:

By uniform practice, usage, etc., petitioner was not regarded as returned to the service when he was called to work on the four days, because there were some 30 men senior to him who could have complained if such work were considered service. He was "regarded as not in the service"; and the courts hold that he was not "in the service" on the days he worked. Therefore, by July 26, 1933, the date the dismissal letter was written, petitioner had been "out of the service" to exceed six months. R 199-201

The concluding sentence to the Answer to Request 79 is:

> "If they are not out of the service to exceed six months, they will be considered as having been in continuous service."

This sentence is construed to mean:

> "If they are out of the service to exceed six months they are automatically out of a job."

So by holding that petitioner was not "in the service on the four days he worked, the courts are equipped to say that he was "out of the service" to exceed six months, by July 26, 1933, and was out of a job; so that the letter written on that date was in effect simply a notice that petitioner was out of a job, and the railroads did not intend to re-employ him. R 222

This holding was vital, and determinative of the case.

A STUDY OF THE COURT OF APPEALS OPINION

This opinion is the source of the few elemental, determinative facts, upon which the questions, of law, are presented to this court. The great bulk of the opinion, however, is devoted to setting up and trying a case which was not presented by the pleadings, the bill and answer. It undertakes to revise, amend, and change, both pleadings, the bill and answer. The bill sued for a breach of contract by wrongful discharge, accomplished by a letter. The opinion changes this to a suit for breach of a contract to re-employ. The answer avers contract terms, saying it was the "agreement", but the opinion changes this so as to plead it was the "understanding", or "uniform practice." R 157-159

And the court in its findings does not support the averments of contract terms, but undertakes to support by oral evidence and interpretation its own substituted

pleadings of "understanding", "uniform practice", "usage".

Other averments of fact in the answer are not supported. For instance in the answer is found the following averment of fact:

> "Defendants say it so happened that during the period of six months prior to July 26, 1933, the business of defendants was such that it was not necessary to place on said extra board a sufficient number of names, when placed in the order of their seniority, to include on said extra board the name of complainant, and that for said reason complainant's name did not appear thereon for more than six months prior to July 26, 1933." R 15

The court does not find in its opinion that there was no such increase in business. This is an interesting averment. To employees laid off Jan. 20, 1933, it concerned them very much as to whether or not the railroad again needed them. This involved an important fact question on which the employees should have a trial under the trial provisions of the contract, unless arbitrary power is to be handed the railroads. Yet this fact averment is nowhere supported in the opinion.

On the contrary there are some findings which militate against it, found on page —— (R 17) We quote:

> "For instance they (the minutes of the local lodge of the Brotherhood of Ry. Trainmen) show in substance the following: That on March 22, 1930, a motion prevailed that 'the men cut off the extra board be called back and permitted to make some time and then be cut off the board': That on May 18, 1933, a motion prevailed that 'the local chairman be empowered to place on the Memphis Ter-

minal extra board of May 25 the members who had been cut off less than six months': that on May 24, 1933, the local chairman reported that 'Trainmaster Burns refused to place the men on the board as requested, which report was accepted and the case closed."

Thus, the men, those working and those laid off alike, wanted the board increased, and they deemed an increase proper and in order, they being the parties affected thereby, and the railroads refused. Had this request been honored there would have been no such suit as this, as petitioner would have been working all these years, as he most desired. But railroad officialdom, the local part of it, preferred not to be denied a brief return of the sovereign power of firing at will which was embryonic in the situation to be enjoyed by the operation of the six months rule. Too good a chance to be missed, and a chance that might be expected to occur only in major depressions.

However, the courts by construction of Request & Answer 79, provide the railroads with a perfect engine for destruction of seniority rights of employees, thus:

The railroads can cut the extra board, and the men cut off are not entitled to a trial on the necessity of the cut. They are faced with an expiring seniority, and right to a job, unless they are called back on an increase of the board within six months. No trial is theirs as to the necessity, vel non, of the increase. The railroads can then keep the board cut, and in the meantime supply their own needs for additional help by the expedient of "emergency work," that is by calling men, those cut off, or anybody, without reference to seniority, and get all the service needed. In this way, with com-

fort, the railroads can keep the board cut for six months, and then enjoy the sovereign power of firing at will, call it by other names if it pleases. Then, if one of the men, as Earle in this case, protests and fights in the courts, he is told that, though he worked, he was called out of seniority order and his work does not count, being "emergency work"; because, if it should be counted, it would mean that some 30 men, his seniors, not called, could complain that he had been preferred in violation of the seniority provisions of the contract. Implicit here is the assumption that, of course, the railroads would do no wrong, would not violate the contract by preferring junior men over seniors; and if it was actually done, it must be said that it was not done, that the work is not "regarded as service"; so that it will not have been done. At the end of six months Earle's seniors are told that they are out of a job because they did not work, and Earle is told that he is out of a job, because the work he did should have gone to his seniors, and comfortably to the railroads, all are out of their jobs. And this is not Gilbert & Sullivan, but serious litigation in courts.

In the construction every favorable inference is given the railroads; none to the petitioner, who is frowned upon by the courts for his contentions in court. (R 203-). The only stain on petitioner's contract is the grime of his toil. He read it. He worked under it. He stood by under it, weathering a depression. He responded when called, and worked.

The Court of Appeals points out, however, that when he worked the four days, there were 30 seniors to him, among those laid off with him in January, and this

made his call to work irregular, or out of seniority order.

Art. II. Sec. B. of the contract page 36, Exhibit 2 to Bill, is:

> "The right to preference of work and promotion will be governed by seniority in the service. The yardman oldest in the service will be given preference, if competent."

R 101

There may, indeed, have been a violation of this section. We do not know. It would depend on whether any of the 30 seniors cared to work or were available, or not. If there was a violation, it was by the railroads, not by petitioner. His sole duty was to respond and perform service. He was not the keeper of the seniority list, nor the extra board, and had none of the facilities for determining the proper order of calling employees to work, nor was that his duty, or in his power. The railroads, not he, had the facilities, and the duty of determining who was available. It might be the case that none were available; and it might be they were. It may be they are now suing for violations of their rights. To defeat this petitioner, or to sustain his claim, will neither help nor hurt the cause of any one of his seniors. Had all of them joined in one suit, it would have been ruled out as multifarious.

All of the reasoning of the courts lead to the one point of their holding, that petitioner was not "in the service" on the days he worked.

Your petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the Court of Appeals, and the Supreme Court of

Tennessee, which presents the questions, and presents his brief for consideration with his petition.

We have no dispute on the facts, but only as to conclusions therefrom, and the law. The opinion of the Tennessee courts is conclusive on the facts. Hence the transcript omits the testimony in the case, and is adequate to present the federal questions involved.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court to the Court of Appeals, and the Supreme Court of Tennessee, commanding said courts to certify and send to this Court on a day certain to be designated a certified transcript of the case, entitled there, C. T. Earle vs. Illinois Central Railroad Co. et. al., to the end that said case may be reviewed and determined by this court, and that petitioner may have such relief as this Court may deem proper, lawful and equitable, and that the opinion and judgment of both courts, the Court of Appeals and the Supreme Court of Tennessee may be reversed, and the decree of the Chancery Court of Shelby County, Tennessee may be affirmed.

C. T. Earle

C. T. EARLE, Petitioner.

Wm. M. Hall

Wm. M. HALL,
Memphis, Tenn.,
Attorney for Petitioner.

Lindsay B. Phillips

LINDSAY B. PHILLIPS
and
W. H. FISHER,
Both of Memphis, Tenn.,

W. H. Fisher

Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No._____

C. T. EARLE, Petitioner

vs.

ILLINOIS CENTRAL RAILROAD CO. & YAZOO & MISSISSIPPI VALLEY RAILROAD CO., Respondents

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This brief, in support of the petition for a writ of certiorari, seeks to reverse the judgment of the Court of Appeals, and the Supreme Court of Tennessee, and to have affirmed the decree of the Chancery Court of Shelby County, Tennessee. The Chancery Court sustained the bill of complaint of petitioner, and granted a recovery of damages for breach of his railroad labor contract of employment. This decree was reversed by the Court of Appeals of Tennessee, and the bill was dismissed. The Supreme Court of Tennessee denied a petition for a writ of certiorari duly presented, and

thereby, endorsed the opinion of the Court of Appeals, and adopted same as its own, leaving the decree of the Chancery Court reversed.

The Tennessee Appellate Courts had to reach their results by what we claim are violations of the Railway Labor Act.

STATEMENT OF THE CASE

Petitioner was a yardman in the employ of the railroads since 1923, and was working under a written contract secured by the Brotherhood of Railway Trainmen with the railroads, effective April 1, 1924. On July 26, 1933, without a trial, he was discharged on the sole ground that he had not performed service off the regular extra board within the preceding six months. Undisputed facts developed that he had worked at his usual duties as yardman, May 29, 30, 31, and June 30, 1933, and then it was claimed that such service did not count, and the appellate courts hold that he was not in the service on those dates, and thereby defeat his claim.

This is a succinct statement. A more detailed statement is made in the petition for certiorari, supra, p—— and reference is made thereto, in the interest of brevity, and to avoid repetition.

SUMMARY OF THE ARGUMENT

The Railway Labor Act of 1926 (44 Stat. 577), in Sec. I, provides a definition of a railroad "employee", and the term, "in the service"; and in Sec. 2, first, re-

quires railroads to exert every reasonable effort to make and maintain agreements with employees concerning rates of pay, rules, and working conditions, and in Sec. 6, provides that changes may be made in agreements only upon thirty days written notice followed by negotiation and agreement.

The term "employee", and the term "in the service," have been construed to include and mean an employee who has been laid off on a reduction of force, this being the situation of petitioner; but petitioner's position is stronger than the employees considered in the case because he actually worked.

N. C. & St. L. Ry. Co. vs Employees Dept. A. F. of L. (6th Cir) 93 Fed. (2nd) 340
Certiorari Denied, 303 U. S. 649

The opinion sets out the same construction to have been made by The Railway Labor Board, The Interstate Commerce Commission, and The Mediation Board.

The Tennessee appellate courts conflict with the statute, and with these interpretations in their holding that petitioner was not "in the service" on the days he worked, and this holding, these courts, themselves, say was the determinative question, and thus they had no non-federal ground, and no other ground even claimed, on which their decision could otherwise rest.

These courts also violate the other provisions of the Railway Labor Act in their reasoning processes toward establishing in their minds that petitoner was not "in the service".

Were Federal Questions Properly Raised?

Proposition of Fact No. 29, filed in the Chancery trial called attention to the applicability of the Railway Labor Act, and first raised the question. (R 157-158).

The Chancellor in his opinion fully observed the Act. This proposition of fact was in the record before the Court of Appeals. That Court first violated the Act, and the question was again raised in the petition for certiorari, assignment of error No. 7. (R 229-230).

None of the courts apparently took notice of the question, but the appellate courts, in their path of reasoning, inevitably cross the Act, and their ultimate, determinative holding violates it.

We submit the federal question was properly presented and denied, under the rulings in:

St. L. I. M. vs. Starbird, 243 U. S. 592.

The Transcript of the Record

In securing the transcript of the record we have been guided by the rulings in:

Texas & Pacific Ry. Co. vs. Leatherwood.
250 U. S. 478
Railway Labor Act of 1926, Amended, 1934.
(48 Stat. 1185)

This amended Act took effect a year after petitioner was discharged. However, in line with the evident policy of the original Act, the amended Act required that railroads file a copy of their contracts with employees, with the Mediation Board. This was done,

and the copy filed, or one like it, was produced in this record, and it proves to be the same contract as that sued on, Effective April 1, 1934, found on pages 32-41 of exhibit 2 to the bill. The produced copy, being Document No. 5. Produced.

We submit that on account of the effective date of the contract produced, and on the basis of the evident policy of the Railway Labor Act, we are entitled to an estoppel against the defendants to contend that anything else is their contract with yardmen.

MOORE vs. I. C. R. R. CO.
180 Miss. 276, 176 So. 593
U. S. D. C. 24 Fed. Suppl. 731
5th Cir. 112 Fed (2nd) 959
312 U. S. 630.

This case is of interest because it involved the very same yardman labor contract as in the instant case, and the same railroads.

The point of decision in this Court was that the Mississippi Supreme Court was the ruling authority on the question of the applicability, vel non, of a Mississippi statute of limitation of 3 years. The decision has no weight against us in the instant case because the Tennessee courts had no Tennessee statute to construe. They simply mined in the common law and, as elsewhere shown, produced an implied contract of usage and practice, which was not pleaded, and was coram non judice, and substituted it for the written contract sued on, and directly violated the Railway Labor Act in terms, and spirit.

The Moore case involved the very same contract, and the several opinions interpret same, and we rely upon these views here. A great deal of similarity will be noted. The same railroads in that case claimed they had a "policy", or perhaps a "practice", or "understanding", that they would retain no employee who brought a suit against them, as Moore had done. The Fifth Circuit felt, and so stated, that if they had such a policy, and expected to rely on it as a just cause for discharge, they should put it plainly in the contract. The Tennessee Courts would be content to go back to the old usage mines and dig it out.

One point of difference is that Moore laid off, voluntarily, a whole year, conducting another suit against his employers: Earle, in the instant case, stayed available and worked when called on.

We now submit a number of propositions on railroad labor contracts:

The railroad has by the labor contract limited its power to discharge an employee, to the one method, to-wit: by a trial initiated by the railroad on charges made for good cause, with right of accused employees to attend, be represented, hear and examine witnesses, have a copy of testimony, with right of appeal. There are many cases of recovery of damages for breach in this particular.

Moore vs. I.C.R.R., 180 Miss. 276; 176 So. 593
" " " U.S.D.C., 24 Fed. Supp. 731
" " " 5th Circuit, 112 Fed. (2nd) 959
" " " U.S. Sup. Ct. decided March 31, 1941 case No. 550, Oct. Term 1940. 312 U.S. 630.

McGlohn vs. G.&S.I. Ry. Co., 174 So. 250.
G. & S. I. Ry. Co. vs. McGlohn, 184 So. 71.
McGee vs. St. Joe B.L.R. Co., 110 S.W. (2nd) 389
93 S.W. (2nd) 1111
McCoy vs. St. Joe B.L.R. Co., 77 S.W. (2nd) 175
Piercy vs. L.&N.R.R.Co., 198 Ky. 248; 248 S.W. 1042, 33 A.L.R. 322.
Rentschler vs. Mo. Pac. R. Co., 85 A.L.R. 1, 126 Neb. 493.
Lockwood vs. Chitwood, 89 Pac. (2nd) 951.
Ward vs. Kurn (Mo.) 132 S.W. (2nd) 245.

In Railroad labor contracts, the trials provided for do not make the railroad officials the final judges, and the arrangements for the handling of grievances, either by the individual employee, or through his union, are not means of concluding the individual, nor are they a prerequisite to a resort to the courts for relief, upon an unjust discharge without good cause; but the individual employee, may without resorting to any of these methods, and without regard to their action in case he does resort thereto, sue in the courts and obtain relief:

I.C.C.R. vs. Moore, 112 Fed. (2d) 959
Moore vs. I.C.R.R., U.S. Supreme Court, March 31, 1941.
Case No. 550—Oct. Term (1940)
312 U.S. 630.
Texas & N.O.R. Co. vs. Bro. of R.R. & S.S, Clerks 281 U.S. 548
Rentschler vs. Mo.Pac.R.Co. (Neb.) 85 A.L.R. 1, 126 Neb. 493
Cole Mfg. Co. vs. Collier, 91 Tenn. 525
Atkinson vs. R.R.E.M.R.S. Co., 160 Tenn. 158

A wrongfully discharged employee may, either before or after, he has pursued the remedies provided in the contract as to seeking reinstatement through the labor union officials, or through the railroad's offcials, acquiesce in the discharge and ask for damages for breach of contract in a court of law.

I.C.R.R. vs. Moore, 112 Fed. (2d) 959
Moore vs. I.C.R.R., U.S. Supreme Court March 31, 1941.
Case No. 550—Oct. Term (1940) 312 U.S. 630.
McClure vs. L.&N.R.R., 64 S.W. (2nd) 538
Ward vs. Kurn, 132 S.W. (2nd) 245
Rentschler vs. Mo.Pac. R. Co., 85 A.L.R. 1, 126 Neb. 493.
McGee vs. St. Joe B.L.R., 110 S.W. (2nd) 389
93 S.W. (2nd) 111
McCoy vs. St. Joe B.L.R., 77 S.W. (2nd) 175
McGlohn vs. G. & S.I.R. Co., 174 So. 250
G. & S.I.R. Co. vs. McGlohn, 184 S. 71
Robinson vs. Dahm, 150 N.Y. Supp. 1053
Piercy vs. L. & N.R.R. Co., 198 Ky. 248; 248 S.W. 1042; 33 A.L.R. 322

In Collective Bargaining contracts with railroad labor, the printed contract becomes the individual contract of each employee when placed in his hands or published among the employees; and an individual may sue thereon.

Ward vs. Kurn, 132 S. W. (2d) 245
Rentschler vs. Mo. Pac. R. Co. (Neb.) 85 A.L.R. 1, 126 Neb. 493
Piercy vs. L. & N.R.R., 198 Ky. 248, 248 S.W. 1042 33 A.L.R. 322

McClure vs. L. & N. R.R. 16 Tenn. App. 369, 64 S.W. (2d) 538
Cross Mt. Coal Co. vs. Ault, 157 Tenn. 461
Lockwood vs. Chitwood (Okla) 89 Pac. (2nd) 951
McGee vs. St. Joe B.L.R. (Mo.) 110 S.W. (2d) 389, 93 S.W. (2d) 1111
McCoy vs. St. Joe B.L.R. (Mo.) 77 S.W (2d) 175
Moore vs. I.C.R. 180 Miss., 276; 176 So. 593
" " " U.S.D.C. 24 Fed. Supl. 731
" " " 5th Circuit, 112 Fed. (2d) 959
" " " U.S. Sup.Ct. March 31, 1941 Case No. 550 Oct. Term (1940) 312 U.S. 630.
McGlohn vs. G. & S.I. Ry. Co. (Miss) 174 So. 250
Gulf & S.I. Ry. Co. vs. McGlohn, 184 So. 71
Robinson vs. Dahm, 150 N.Y. Suppl. 1053
Association of Ind. Corp. vs. McAlexander, 168 Tenn. 443
Title Guaranty Co. vs. Boshnell, 143 Tenn. 685

An individual beneficiary under a group contract, or a parent contract, is entitled to specific notice of any change therein which may affect his rights thereunder.

Powers vs. Journey Bricklayers Union, 130 Tenn. 643

The management of the railroad does not possess the arbitrary power to release from the service permanently any employee laid off on account of reduction in force upon any flimsy pretext or reason and the employee be without remedy. The employee must be retained unless good cause be shown upon a trial. Mere reduction of force is not good cause.

Ward vs. Kurn (Mo) 132 S.W. (2d) 245
McClure vs. L. & N.R.R. Co., 64 S.W. (2d) 538

Ill. Cent R.R. vs. Moore, 112 Fed. (2nd) 959
Moore vs. I. C. R. R., U. S. Sup. Ct., Mrch 31, 1941
389, 93 S.W. (2d) 1111
Case No. 550, Oct Term (1940) 312 U.S. 630
McClure vs. L. & N.R. 64 S.W. (2d) 538
Rentschler vs. Mo. Pac. R. Co., 85 A.L.R. 1, 126
Neb. 493.
McGee vs. St. Joe B.L.R. 110 S.W. (2d) 389,
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McCoy vs. St. Joe B.L.R. 77 S.W. (2nd) 175
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Robinson vs. Dahm, 150 N.Y. Supp. 1053
Piercy vs. L. & N.R.R., 198 Ky. 248,
248 S.W. 1042, 33 A.L.R. 322

Seniority is a valuable right, under railroad labor contracts, and this right the courts will protect at the suit of the indivdual.

Lockwood vs. Chitwood (Okla), 89 Pac. (2d) 951
Rentschler vs. Mo. Pac. R. Co. (Neb.), 85 A.L.R. 1,
126 Neb. 493
Piercy vs. L. & N.R.R., 198 Ky. 248; 248 S.W. 1042
33 A.L.R. 322
McClure vs. L. & N.R.R., 16 Tenn. App. 369
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389, 93 S.W. (2d) 1111.
McCoy vs. St. Joe B.L.R. Co. (Mo.), 77 S.W. (2d)
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Moore vs. I.C.R.R., 180 Miss. 276, 176 So. 593
" " " U.S.D.C. 24 Fed. Supl. 731
" " " 5th Cir. 112 Fed. (2d) 959
" " " U.S. Sup. Ct. March 31, 1941
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McGlohn vs. G. & S.I. Ry. Co. (Miss.), 174 So. 250
Gulf & S.I. Ry. Co. vs. McGlohn, 184 So. 71
Robinson vs. Dahm, 150 N.Y. Supl. 1053

Defendants having filed with the National Mediation Board a copy of what they represented to that board to be the contract with yardmen, are bound by that as the contract, and are not permitted to add to or vary or dispute that as being the sole contract, in view of the National Railway Labor Law which requires the filing of this contract, and the filing of any changes which may be made therein This is an estoppel based directly on statute.

U.S. Railway Labor Act of 1926, 1934, 44 Stat. 577 48 Stat. 1185.
Ward vs. Kurn (Mo.), 132 S.W. (2d) 245
Moore vs. I.C.R.R., U.S. Sup. Ct. Opinion, March 31, 1941, Case No. 550, Oct. Term (1940) 312 U.S. 630

It is well settled that oral testimony is not admissible to contradict, add to, or vary, the terms of a written contract; even to explain same when the written contract is plain and unambiguous. There is no conflict and no ambiguity in the written contract involved in this case, and it is the sole functon of the Court to construe and interpret same.

Ward vs. Kurn (Mo.), 132 S.W. (2d) 245
Gibson Co. vs. Fourth & First N. Bank, 20 Tenn. App. 177
McQuiddy Prtg. Co. vs. Hirsig, 134 S.W. (2d) 197-204 Tenn. Code Sec. 9726
Litterer vs. Wright, 151 Tenn. 210
McGannon vs. Farrell, 141 Tenn. 210

Deaver vs. Mahan, 163 Tenn. 429
Cobb vs. Wallace, 45 Tenn. 539
Searcy vs. Brandon, 167 Tenn. 218
Todd vs. Bank, 172 Tenn. 526

Oral testimony, as against a written contract, cannot be justified as admissible on the theory of subsequently made agreements, when the defendants' answer contains the positive averment that the agreements were long before complainant entered the service, that date being 1923, and when the written or printed contract was executed in 1924. This would constitute a distinct variance between allegata and probaba.

Pencil Co. vs. R.R., 124 Tenn. 57

When the answer filed by defendants in its pleading avers that the agreement was thus and so, under such a pleading the defendants may not support the averments by oral proof which is offered as admissible on the basis of being practical interpretation, or usage, because this involves a distinct variance between the pleading and proof, between allegata and probata: If a contract is averred, a contract must be proven, not mere usage or interpretation.

Pencil Co. vs. R.R. 124 Tenn. 57
R.R. vs. Naive, 112 Tenn. 235.

When suit is based on a written contract, oral testimony cannot be admitted under the theory of practical interpretation by the parties, (a) when there is no ambiguity in the words or terms used in the contract, at which such testimony is directed (b) when the written contract itself provides abundant usage of the terms and words fully indicating their meaning, and (c) when

the so-called practical interpretation is nothing but generalized statements by witnesses, who fail and refuse to produce the instances of application and usage; or when the interpretation is just simple interpretation, and not practical, or supported by practice.

Ward vs. Kurn (Mo.) 132 S.W. 245
Neilson vs. Lowe, 149 Tenn. 563
Pencil Co. vs. R.R., 124 Tenn. 57

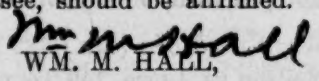
The measure of damages for breach of contract is found by taking the earnings of the next junior man and deducting the wages actually earned by the discharged employee in other fields of work for the period covered.

I.C.R.R. vs. Moore, 112 Fed. (2d) 959
Moore vs. I.C.R.R., U.S. Supreme Court, March 31, 1941, Case No. 550, Oct. Term (1940) 312 U.S. 630
Ward vs. Kurn (Mo.), 132 S.W. (2d) 245

A party to a contract, or one suing on a contract, is not estopped, or committed by any former misconception, or mistaken construction of the instrument, but may abandon any former conceptions of his rights, and adopt any more favorable construction that a court of justice may give, this matter being a matter of law for courts, and the litigant being entitled to enlightenment and progress of opinion.

Tate vs. Tate. 126 Tenn. 169.

It is respectfully submitted that under the law and the facts of this case, the judgments of the Court of Appeals, and the Supreme Court of Tennessee, should be reversed, and the decree of the Chancery Court of Shelby County, Tennessee, should be affirmed.



WM. M. HALL,
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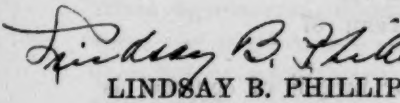

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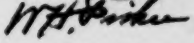

Of Counsel.

(24)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

C. T. EARLE,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, et al.,

Respondents.

No. 440

REPLY TO THE PETITION FOR WRIT OF CERTIORARI

[redacted]

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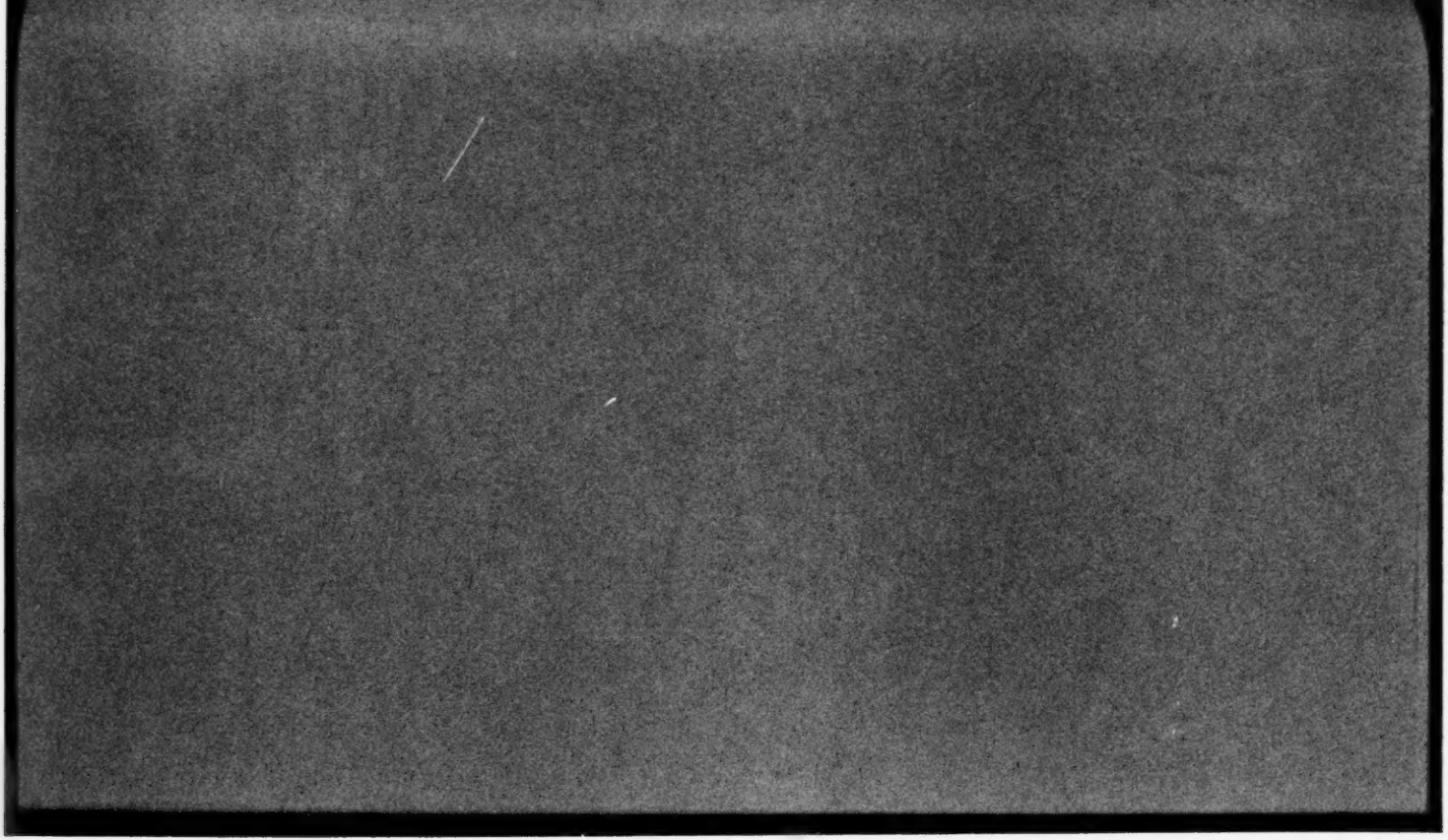

SUBJECT INDEX

CASES CITED

STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

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C. T. EARLE,

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No. 440

REPLY TO THE PETITION FOR WRIT OF CERTIORARI

The sole ground on which the writ of certiorari is sought is that petitioner has been denied a right, privilege or immunity granted under the Railway Labor Act of Congress, 44 Stat. at L. 577, chap. 347, as amended, 48 Stat. at L. 1185, chap. 691, 45 U.S.C.A., secs. 151 et seq. No claim is made that the opinion of the Court of Appeals of Tennessee on its face denies such right. *State of Minnesota v. National Tea Company*, 309 U. S. 551. This Court is asked to find that the opinion necessarily has that effect.

Perhaps it is unnecessary to point out that before this Court will grant certiorari it must affirmatively appear of record not only that the federal question here relied on was distinctly presented to the state courts for decision, but that its decision was necessary to a determination of

the case, and that the federal question was actually decided or that the judgment could not have been rendered without deciding it.

Shulthis v. McDougal, 225 U. S. 561;
Lynch v. People of New York, 293 U. S. 252;
State of Minnesota v. National Tea Co., 309 U. S. 551;
Cleveland, etc., R. Co. v. Cleveland, 235 U. S. 50;
Parker v. McLain, 237 U. S. 469;
Chesapeake, etc., R. Co. v. McDonald, 214 U. S. 191.

As shown hereinafter, no substantial federal question was presented in the trial court and none was decided; no federal question of any kind was presented in the Court of Appeals of Tennessee or decided in that court; and no substantial federal question was presented to the Supreme Court of Tennessee, or necessary to be decided or was decided by that court.

The employment contract out of which the suit arises merely had as its background the Railway Labor Act of Congress of May 20, 1926, before the amendment of June 21, 1934. That is not enough.

Barnhart, et al. v. Western Maryland Ry. Co., 128 F. 2d. 709; certiorari denied October 19, 1942.

All that the state courts were called upon to find was the terms and provisions of the contract under which petitioner sued and to construe and apply those terms and provisions.

This Court, of course, is not now concerned with the correctness of the construction of the contract made by the state court. This Court must assume the contract means what the Court of Appeals of Tennessee held it to mean, and then determine whether that construction denies petitioner a right or privilege granted by the Railway Labor Act of Congress.

STATEMENT OF THE CASE

Petitioner instituted this suit in the state court to recover damages for the alleged breach of his individual contract of employment with respondents, claiming that respondents breached petitioner's contract of employment by refusing to reemploy him as a switchman in the Memphis yards. The Court of Appeals of Tennessee held that there was no breach and, therefore, dismissed petitioner's suit. The Supreme Court of Tennessee denied certiorari.

Petitioner was employed by respondents on September 26, 1923 as a switchman or yardman. He continued in the employ of the respondents until January 20, 1933, on which date due to a falling off in business, occasioned by the economic depression, respondents reduced the forces employed in the Memphis yards and on that day petitioner, together with 55 or 60 other yardmen, was let out of the service. In his original bill petitioner did not claim that the action of respondents in letting him out of the service on January 20, 1933 was wrongful and the Court of Appeals held that action was in accordance with the terms of petitioner's contract of employment with respondents.

Petitioner's individual contract of employment had as its basis the Brotherhood of Railroad Trainmen contract which in Request 79 and the Answer thereto provided that for a period of six months after he was so let out of the service he should retain his seniority rights, and if during that six months' period men were employed, those let out of the service would be "reemployed" and "taken back into the service" in accordance with their seniority. Petitioner alleged that he worked under his

original contract of employment on May 29, 30, 31, 1933 and again on June 30, 1933, and that, therefore, when respondents after the expiration of the six months from January 20, 1933, to-wit: on July 26, 1933, notified him by letter that his seniority had been lost by the expiration of the six months' period, that action was wrongful and a breach of his original contract of employment. Petitioner claimed that his work on May 29, 30, and 31 and on June 30, 1933 was employment under his original contract of employment; and that, therefore, he had not been "out of the service" for six months on July 26, 1933 when the notice was given; hence, his original contract of employment was breached.

On the other hand, respondents throughout have taken the position that the services performed by petitioner on May 29, 30 and 31 and again on June 30, 1933 were not services performed under his original contract of employment; that the work performed on those four days was performed under a special contract and not under his original contract of employment; that the work done by him on those four days was what is known in railroad parlance as "emergency work"; that emergency work did not have the effect of tolling or of extending the six months' period nor did it affect the seniority rights of any of the men laid off, including petitioner; that it was not a "reemployment" or a "taking back into the service" within the purview of petitioner's original contract of employment, and that, therefore, the six months' period had elapsed on July 26, 1933, and petitioner's contract of employment had not, therefore, been breached.

It is obvious, therefore, that the question presented to the state courts for decision was not what the status of petitioner was during the six months' period. That was fixed by the employment contract. The sole question presented to the state courts was whether the petitioner had been "out of the service" to exceed six months. This question is to be determined by ascertaining whether the work on the four days in question interrupted the running of the six months' period. That question, in turn, is to be determined by ascertaining the meaning of certain technical terms of petitioner's employment contract, which terms in railroad parlance and among railroad people have a well-known and universally recognized meaning; and further, by ascertaining whether the work done on the four days mentioned was done under petitioner's original contract of employment or under a special contract for temporary employment. If the work was done under a special contract of temporary employment and not under the original contract of employment, as the state courts held it was, then the question presented was the effect, if any, such special employment had on his seniority rights under the original contract of employment.

Obviously, all of these questions involve the interpretation and application of the employment contract in the light of the settled course of conduct of the interested parties, and are questions of state law rather than federal law.

FACTS OF THE CASE

Long prior to the time petitioner entered into his individual contract of employment with the respondents, respondents and the Brotherhood of Railroad Trainmen (hereinafter referred to as the Brotherhood) had entered into a contract providing for working conditions, rates of pay, manner of employment and discharge of employees, etc. That contract was from time to time added to and changed by the contracting parties. Under that contract, from its inception to the present time, respondents always had the unquestioned right to reduce forces whenever the business of the railroad company did not justify retaining all of its employees in the service. Prior to 1914 employees so let out lost all of their rights, seniority and otherwise, their status then being just as if they had never been employed; but the Brotherhood desired to have the contract changed in this respect and for many years endeavored to effect such a change. The efforts of the Brotherhood resulted in 1914 in the agreement embodied in Request 79 and the Answer thereto. Changes in the contract were made in the form of a request by the Brotherhood for the proposed changes and the answer of the railroad company thereto. Under this particular amendment to the Brotherhood contract it was provided in substance that if an employee was let "out of the service" as a result of reduction in force due to the lack of business, the railroad company agreed that if such employee was "reemployed" and "returned to the service" within six months from the time he was let out of the service he would be reemployed in the order of his seniority, and in that event would be considered as having been in "continuous service."

At once it will be perceived that the proper construction of this contract depended on what the contracting parties meant by the words "out of the service," "reemployed" or "returned to the service."

The record shows that those terms have a well known meaning in railroad parlance. At the time this amendment was made, both the officials of the railroad company and the officials of the Brotherhood thoroughly understood exactly what those words meant. They well knew that performing emergency work such as petitioner did on the four days in question was not a reemployment and did not constitute taking him back into the service or interrupt the running of the period he was out of the service. Not only did the officials of the railroad company so testify, but all the officials of the Brotherhood, both the general officials of the Brotherhood in Chicago and all of the officials of the local lodge in Memphis, likewise so testify. So did all of the individual members of the Brotherhood who were called as witnesses, except petitioner. In addition, the general counsel of the Brotherhood, Mr. W. A. Endle, of Cleveland, Ohio, caused himself to be appointed amicus curiae when this case was pending in the Court of Appeals of Tennessee and filed a printed brief in that court, urging on the court the meaning of the terms as above indicated. The Brotherhood, both by the testimony of all its officials and by the brief of its General Counsel, supports in every detail the contentions of respondent in this litigation.

Not only that, but petitioner filed a claim in his local lodge at Memphis, setting up the same contention as here made, and the local lodge, construing these words just as the Court of Appeals of Tennessee did, held that pe-

titioner had no claim. Petitioner thereupon appealed to the General Chairman of the Brotherhood in Chicago (the general chairman corresponds to the president of an ordinary corporation), and the general chairman made the same decision.

Petitioner then appealed to the Board of Directors of the Brotherhood which body likewise denied his claim. (R., p. 164). In *L&NRR Co. et al. v. Miller,* 38 N. E. (2) 239, the Supreme Court of Indiana held such decisions by the Brotherhood tribunals were binding on the employee and this Court on its opinion day on October 12 denied certiorari in that case.

The record, discloses, therefore, that both respondents and the Brotherhood are and have always been in perfect accord as to the meaning of these words and both agree that by doing the work on the four days in question petitioner was not "reemployed" and was not "taken back into the service."

The record in this Court shows that the record in the state courts is "a very large record" and that "a vast amount of testimony has been taken by both sides." (R., p. 35). This testimony, as discussed in the opinion of the Court of Appeals of Tennessee, not only shows what the contracting parties meant by the use of those terms, but further shows that from the time the amendment to the contract was made in 1914 to the present time it has been so construed not only by respondents and by the Brotherhood, but by all of the individual members of the Brotherhood. This testimony further shows that when petitioner entered the service of respondent in 1923 he well knew the meaning of those terms in the contract and well knew that the contract

meant just exactly what the appellate courts of Tennessee have held it to mean and what the Brotherhood, both the local lodge and the general lodge in Chicago, knew it meant. The state courts have held that petitioner acquiesced in that meaning; that he knew the contract was being given that meaning by the parties, by the men, as well as by himself. Moreover, the state courts held that when petitioner adopted as his own the contract between the Brotherhood and respondents, he adopted this meaning as a part of the contract.

HOLDING OF THE APPELLATE COURTS OF TENNESSEE

The Court of Appeals of Tennessee, construing the contract in the light of the "vast amount of testimony taken by both sides" (R., p. 35), held that when petitioner entered the service of respondents the contract between respondents and the Brotherhood became the basis of his individual contract, including the amendment made in 1914 known as Request 79 and Answer thereto; that the work performed by petitioner on May 29, 30, 31 and June 30, 1933, was not an employment under his original contract of employment, and, therefore, did not amount to a "reemployment" or "taking back into the service" within the purview of Request 79 and Answer thereto; that his employment on those four days was a special employment under a special contract for temporary emergency work; that this contract for temporary emergency work was entirely separate and apart from his original contract of employment, and was inconsistent with many of the terms of his original contract of employment. As to this, the Court of Appeals said:

> "To the contrary, he was manifestly working under separate and radically different contracts of tem-

porary employment, one made on May 29, 1933, and another on June 30, 1933. * * *

"After mature reflection, we think the clearest and simplest view of this whole matter is that the complainant's employment on the four days in question is to be regarded as having been under entirely separate and distinct contracts which were not in writing but arose by implication from the circumstances, the terms and conditions of which were fixed by usage prevailing among those engaged in the activities and operations of the Memphis Terminal Yards and acquiesced in by the complainant."

(R., pp. 204-205).

The court, therefore, held that the four days' emergency work was not done under his original contract of employment, and for that reason had no effect on his seniority rights under that contract. That being true, his seniority rights were not preserved by that emergency work but were lost after the expiration of the six months period from January 20, 1933, so that the failure to reemploy him on and after July 26, 1936, was not wrongful and was not a matter of which he could complain.

The Court of Appeals of Tennessee further held that under the authority of *Cross Mountain Coal Company v. Ault,* 157 Tenn. 461, the agreement between the Brotherhood and these respondents became a part of petitioner's individual contract of employment, and that Request 79 and Answer thereto was at that time a part of the Brotherhood contract; that respondents had the right to let petitioner out of the service because of the necessity of reduction in forces and that all the rights petitioner thereafter had were embodied in Request 79 and Answer thereto; that the terms contained Request 79 and Answer thereto, and particularly the terms "returned to the serv-

ice," "taken back into the service," "reemployed" and "out of the service" had in railroad parlance a well known and universally recognized meaning; that when respondents and the Brotherhood made the contract each of them knew and understood the meaning of those terms in railroad usage, and each of them knew that those terms were being used in that technical sense and bore that meaning; that since Request 79 and Answer thereto became a part of the contract in 1914 on down to the present time, in the practical operation of the parties under the contract those terms had been given this well known universally accepted meaning; that both the Brotherhood and the respondents in their long operation under the contract had invariably and in every instance placed the same construction on those terms.

Under the meaning given those words by the parties to the contract, and in railroad parlance, doing emergency work of a temporary character did not constitute being "reemployed" and did not constitute being "returned to the service" and did not alter petitioner's status as "out of the service" as those words and phrases are used in Request 79 and Answer thereto.

The Court of Appeals of Tennessee further held that when this petitioner adopted the Brotherhood contract as a part of his individual contract of employment he knew the meaning of those terms and knew that doing emergency work did not constitute a reemployment or a return to the service; that throughout the time he remained an employee petitioner well knew the meaning of those terms and acquiesced therein. The Court said: "with respect to his acquiescence in the interpretation given the contract, we rest our decision on the evidence aliunde." (R., pp. 223-224).

In view of the foregoing, the Court of Appeals of Tennessee held that petitioner's contract meant that doing emergency work was not a "reemployment" and was not a "return to the service," and that, therefore, such work did not toll the running of the contractual period of six months. Hence, that on July 26, 1933, after the six months had elapsed petitioner's seniority rights had expired and he bore no relationship to respondents as an employee or otherwise.

We submit it is apparent from the foregoing statement of the holding of the Court of Appeals of Tennessee that petitioner has been denied no right or privilege granted him by the Railway Labor Act of Congress. We know of no act of Congress which prohibits an employee from entering into a special contract with his employer to do temporary emergency work, agreeing that such temporary emergency work, done under a special contract, shall not affect his seniority rights under his regular contract of employment.

Nor do we know of any act of Congress that prohibits an employee from entering into a special agreement providing that the doing of temporary work known in railroad parlance as "emergency work" shall not constitute being taken back into the service. So far as we are aware, Congress permits a railroad employee to make whatever contract he desires in regard to such matters.

THE QUESTION PRESENTED TO THIS COURT

Briefly stated, the precise question presented to this Court for decision is this:

Petitioner entered into a contract of employment with respondents under the terms of which respondents had the right to let petitioner as well as others out of the service whenever the business of respondents did not justify his being retained in the service; the contract further provided that if petitioner, along with others likewise let out of the service, were reemployed and taken back into the service within six months from the time they left the service, the men would be reemployed in the order of their seniority, and if so reemployed within six months they will be considered as having been in continuous service; but it was also provided in the contract that doing "emergency work" of a temporary nature was not to be considered as a reemployment or as being taken back in the service within the purview of the contract and did not, therefore, interrupt the running of the contractual period of six months. The question presented to this Court is whether or not that contract deprives petitioner of a right or privilege granted to him by the Railway Labor Act of Congress.

Or considering the further holding of the Court of Appeals of Tennessee: Petitioner entered into an individual contract of employment of a permanent nature with respondent under the terms of which if he were let out of the service on account of the falling off of business, then if he were taken back into the service during the succeeding six months he would retain certain seniority rights under that contract; but it was further

provided that if during the six months period he was specially employed to do some particular work of a temporary nature, which employment was not made under the original contract of employment, such temporary employment, it was agreed, would not affect his seniority rights under the original contract for permanent employment.

Does such contract deprive petitioner of a right or privilege granted by the Railway Labor Act of Congress. We submit the answer is obvious.

The above is precisely what the state courts held petitioner's contract meant. If petitioner at the time he entered into his contract for employment had put therein an express provision that "in the event while laid off on account of falling off in business I do emergency work I agree that such work will not be performed under this contract of employment and will, therefore, have no effect on my seniority rights," manifestly petitioner would not thereby contract away any right granted him by an Act of Congress; or if petitioner had inserted in his contract of employment a provision that "I agree that emergency work shall not constitute 'reemployment' and shall not constitute 'return to the service' under this contract, and especially under 'Request 79 and Answer thereto'," such a provision, we submit, would not affect any right or privilege granted by the Railway Labor Act of Congress.

We submit, therefore, that for the same reason the construction placed on petitioner's contract by the appellate courts of Tennessee denied him no federal right.

NO FEDERAL QUESTION RAISED IN STATE COURTS

We submit that petitioner did not raise in the state courts the alleged federal questions on the basis of which he now seeks to invoke the jurisdiction of this Court.

In his petition for certiorari in this Court, petitioner contends that the federal questions were raised (1) by the motion made in the Chancery Court to strike certain parts of the answer, (2) by his proposition of fact No. 29 filed in the Chancery Court, and (3) by assignment of error 7 in his petition for certiorari filed in the Supreme Court of Tennessee.

The motion to strike respondents' answer (R., pp. 19-26) filed in the Trial Court is too lengthy to summarize here, but we submit the reading thereof discloses that no federal right or privilege was there claimed.

In petitioner's proposition of fact No 29 (R., pp. 151-152) also filed in the Trial Court no federal right or privilege here relied on was claimed. The only proposition asserted there was that respondents were estopped to assert that petitioner's contract of employment "conflicted with" or was "amendatory to" the contract filed with the Mediation Board. The law of estoppel, we submit, is not a right or privilege granted by an Act of Congress. The doctrine of estoppel arises from the common law. Moreover, the contract involved in this suit is admitted to be the identical contract filed with the Mediation Board and respondents have never contended otherwise.

We submit that the failure to raise the so-called federal questions in the trial court precludes petitioner

from raising them in this Court. *Erie Railroad v. Purdy*, 185 U. S. 148.

Petitioner makes no claim that any federal questions were raised in the Court of Appeals of Tennessee, the judgment of which Court is final and from which there is no appeal as a matter of right. *Tennessee Code* of 1932, Sec. 10629.

In the petition for certiorari filed in the Supreme Court of Tennessee, assignment of error 7 (R., pp. 229-230), petitioner for the first time claimed that a right or privilege granted under an Act of Congress had been denied him. He there claimed that a federal right or privilege was denied him because (1) respondent is estopped to assert that the contract filed with the Mediation Board is not the true contract; and (2) that his contract provides for a trial in the event of a discharge, which trial, he asserts, was denied him. No claim was made, however, that the Court of Appeals defined "employee" and "in the service" different from the way those terms are defined in the Railway Labor Act. Petitioner is limited now to the grounds then asserted. *Erie Railroad v. Purdy*, 185 U. S. 148.

It results, therefore, that petitioner made no claim in the trial court that he possessed a federal right, nor did he make such a claim in the Court of Appeals. He made such a claim for the first time in the petition for certiorari filed in the Supreme Court of Tennessee. We submit that comes too late, but if we are mistaken as to that, then we say that the two grounds set up in the assignments of error in the Supreme Court of Tennessee are not based upon rights or privileges granted by the Railway Labor Act of Congress.

Discussing specifically the specifications of error filed in this Court, we say as to specification of error I that nowhere in any state court did petitioner claim a federal right or privilege on the ground that the definition of "employee" and "in the service" in Section I of the Railway Labor Act conferred a federal right and privilege. Petitioner cannot make that claim here for the first time. *Erie Railroad v. Purdy*, supra.

Under specification II the claim is that in the overruling of petitioner's motion to strike certain parts of the answer petitioner was denied a right or privilege granted him under Section 6 of the Railway Labor Act. That question was not raised in any of the state courts, but is raised in this Court for the first time. Moreover, no federal right is set up in the motion to strike.

As to specification III, we submit that the doctrine of equitable estoppel is not a right or privilege granted by any Act of Congress. In addition there is no basis for the claim, for all concede that the contract filed with the Mediation Board is identical with the contract sued on and no court through which this case has passed has held to the contrary.

Under specification IV this Court is asked to reverse the Court of Appeals on the merits of the case.

We submit, therefore, that no federal question here relied on was asserted in the state courts.

NO MERITS IN SPECIFICATIONS OF ERROR

Petitioner first insists that he was denied a right or privilege granted by an Act of Congress because he says the Court of Appeals of Tennessee did not define "employee" and "in the service" as those words are defined in Section 1 of the Railway Labor Act, as construed in *Nashville, etc., Ry. v. Railway Employees,* 93 Fed. (2d) 340. That act, that court said: "establishes the machinery by which collective bargaining between interstate carriers and the several crafts or classes of their employees may be carried on through freely selected representatives of both parties."

The purpose of the Act, therefore, is not to command what shall be included in every collective bargaining agreement, nor to regulate the terms of such agreements, but its sole purpose is to set up machinery to enforce whatever agreements the parties themselves make. Each employee is thereafter free to make his own contract, and to include therein whatever terms the parties agree to. *Virginia Ry. Co. v. System Federation No.* 40, 300 U. S. 515. The effect of the Act is not to make void every contract an employee makes with the carrier if in the contract the word "employee" or "in the service" is agreed to have a meaning different from the meaning of those words as used in the Act. The Act provides "when used in this chapter" "and for the purposes of said chapter" certain words used therein shall have a certain meaning. Those definitions obviously are to be used only in construing the Act, and are not necessarily the meanings to be attached to those words in every contract made by an employee of any railroad in the United States.

The sole case relied on by petitioner is *Nashville, etc., Ry. v. Railway Employees,* supra. The only question presented there was what employees were entitled to vote in the election for a bargaining representative, which election was held under the provisions of the Act. The Court held that a furloughed employee had the right to vote in an election held under the terms of the Act, since the Act provided that all employees could vote, and he was an employee as defined in the Act since his relationship with the employer had not completely terminated, and that he had sufficient interest in the election to entitle him to vote. But that is precisely what the Court of Appeals of Tennessee held in this case. During the six months period the Court of Appeals held that "a yardman let out in the reduction of forces while not in the service that in the sense he formerly was, nevertheless sustained for the period specified a contractual relation to the carrier." (R., p. 186.)

That is precisely the definition of employee contained in the Act and is in accord with the holding of the Court in *Nashville, etc., Ry. v. Railway Employees,* supra.

It was not necessary for the Court of Appeals of Tennessee to decide what petitioner's status was during the six months period. What the court was called upon to decide was: (1) when petitioner was called to do temporary emergency work was he thereby "returned to the service" as those words were used in the contract, and (2) was the employment to do temporary emergency work made under a special contract, or was it made under petitioner's original contract of employment so as to affect his seniority rights under his original contract of employment.

The Court of Appeals held that when petitioner worked during the four days in May and June he was not working under his original contract of employment, but was working under a special contract for temporary work, and that the work under the special contract for temporary work did not affect his rights under his original contract for regular employment.

That one who is employed for a particular transaction or for temporary work does not thereby become an "employee" is well settled.

> *Louisville, etc., Ry. v. Wilson,* 138 U. S. 501;
> *Clark, et al. v. Renninger,* et al., 89 Md. 66;
> *Lewis v. Fisher, et al.,* 80 Md. 139;
> *Daub, et al. v. Maryland Cas. Co.,* 148 S. W. (2d) 58.

In *Louisville, etc., Ry. v. Wilson,* supra, the Court said:

> "The terms 'officers' and 'employees' both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employe. They *imply continuity of service,* and *exclude those employed* for a *special and single transaction.*"

While there is no merit in the foregoing contention of petitioner, yet we repeat petitioner did not claim in the Chancery Court, in the Court of Appeals or in the Supreme Court of Tennessee that he was denied a federal right or privilege on the ground above discussed.

Specification II is that the trial court erred in overruling the motion to strike respondents' answer, claiming that this action deprived petitioner of a right or privilege granted by an Act of Congress, because it vio-

lated Section 6 of the Railway Labor Act which forbids a change in the contract except in the manner provided in the Act. In the first place, the motion to strike (R., pp. 19-26) does not invoke any federal right. In the second place, the Courts of Tennessee have held that there was no change in the contract, and this holding of the state courts cannot be questioned here. There has been no question made throughout the litigation that the contract made with petitioner was changed, but the sole inquiry was what the contract meant. It results, therefore, that (1) no federal right was invoked in the motion to strike and (2) none was denied.

Under specification III it is claimed that respondent is equitably estopped on account of the contract it filed with the Mediation Board. With all due deference, we are wholly unable to follow petitioner in this contention. It is conceded that the contract filed with the Mediation Board in 1934 is identical with the contract petitioner made with this respondent and on which he sues. Since there was no change in the contract, we are wholly unable to understand how petitioner has been denied a federal right.

In addition, the amendment to the Railway Labor Act relied on (requiring respondent to file the contract with the Mediation Board) was passed long after July 26, 1933, when it is claimed petitioner's contract was breached, and could not, therefore, affect petitioner's rights. This 1934 amendment to the Act requires that the contract in effect April 1, 1934, be filed, and this was long after petitioner left the service of respondent. Whatever may have been the contract on April 1, 1934, would not have affected petitioner's rights alleged to flow from a breach

in 1933. Further, equitable estoppel can be invoked only when the petitioner changed his position to his prejudice relying on the act upon which he bases the estoppel (Baird v. Fidelity, etc., Ins. Co., 178 Tenn. 653), and manifestly petitioner cannot claim here that in 1933 he relied on a contract that was filed in 1934.

Lastly, whether estoppel applies or not is not a federal question. That is a question of state law for the state courts to decide.

Under specification IV petitioner asks this Court to reverse the appellate courts of Tennessee on the merits of the case, without regard to any federal question. Manifestly, this Court has no such jurisdiction.

ALL RIGHTS CLAIMED WERE GRANTED

Another complete answer to the contention of petitioner is that all rights claimed here, federal or otherwise, were granted. None was denied. We submit if the right to have the words "employee" and "in the service" defined in this litigation as they are in the Railway Labor Act is a federal question, then petitioner has been granted that right by the opinion of the Court of Appeals of Tennessee, for that Court has defined "employee" and "in the service" (R., p. 186) exactly as the Railway Labor Act does. If the right to have respondents held estopped from claiming that the contract filed with the Mediation Board is different from the contract sued on is a federal right, then petitioner has not been denied that right because it is nowhere denied that the two contracts are identical, and no state court has held to the contrary. If it be said that petitioner had a federal

right to have respondent not change its contract with petitioner, except as provided by the Act, then we answer that the contract has not been changed by the litigants or by the state courts. The courts of Tennessee have merely held what the two contracts, concededly identical, meant.

It results that every right claimed to be a federal right has been granted petitioner and none has been denied him.

We submit, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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